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Teh & Lee (suing as a firm) v Anwar Yeo Abdullah & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D1–24–439 OF 2006
MOHD HISHAMUDIN J
13 APRIL 2009

Civil Procedure — Interpleader summons — Stakeholder's interpleader — Third defendant appointed first and second defendants to undertake corporate restructuring scheme — First and second defendant deposited RM500,000 with plaintiff firm as stakeholder under terms of agreement — Failed to disclose material fact — Proposed restructuring scheme rejected — Whether first and second defendants entitled to refund of deposit — Anti-Corruption Act 1997 s 11(c) — Rules of the High Court 1980 O 17 r 5

This was an interpleader application by the plaintiff pursuant to O 17 r 5 of the Rules of the High Court 1980 in relation to a sum of RM500,000 held by the plaintiff's firm as a stakeholder. The facts were that the third defendant was desirous of conducting a corporate restructuring exercise so as to restructure its debts. The third defendant appointed the first and second defendants to undertake the restructuring of the scheme. The parties entered into an agreement called the 'definitive agreement'. Among the terms of the said agreement was that the first and second defendants were required to deposit a sum of RM500,000 with the plaintiff's legal firm as a stakeholder for their due compliance of the terms in the agreement. The proposed restructuring scheme was, however, subject to the approval of the Securities Commission. Accordingly, an application was made to the Commission for the approval. The Commission however, rejected the application on the ground that the first defendant had previously been charged under s 11(c) of the Anti-Corruption Act 1997 ('ACA'). The first and second defendants applied to this court for the deposit to be refunded to them. The third defendant, on the other hand, applied to this court for the deposit to be forfeited. The plaintiff on their part applied to this court for a determination as to whether the deposit should be refunded to the first and second defendants or whether the third defendant was entitled to forfeit the deposit. In addition, the plaintiff was also seeking for an order that they be entitled to their professional fee and charges of RM62,150 and that such amount be deducted from the deposit.

Held, allowing the plaintiff's and the third defendant's application with costs; dismissing the first and the second defendants' application:

(1) By virtue of cl 8.1(c) of the definitive agreement, the third defendant had the right to forfeit the deposit. There had been a default on the part of the

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first and second defendants ('the target shareholders') in the implementation of the proposed restructuring scheme. This default came about when the Securities Commission rejected the proposed scheme on the ground of unsatisfactory corporate governance as the first defendant had been charged under s 11(c) of the ACA (see paras 10–11).

(2) The first and second defendants were not entitled to the refund of the deposit. They had committed a breach of the definitive agreement, leading to a rejection of the restructuring proposal, and subsequently, leading to the mutual termination of the definitive agreement by the parties concerned. The breach was committed by reason of the fact that they had failed to disclose a material fact to the Securities Commission at the time of submitting the proposed restructuring scheme to the commission. By virtue of cl 5.1(a) and (b) of the agreement, the first and second defendants were under a duty to disclose to the Securities Commission the fact that the first defendant had been charged under s 11(c) of the ACA. This they had failed to do. Clause 2.6(b) of the definitive agreement implies that the first and second defendants were not entitled to a refund of the deposit if the termination was due to a fault on the part of the first and second defendants — which was the case here (see para 14).

(3) By virtue of cl 8.1 of the definitive agreement, the plaintiff was entitled to their professional fee of RM62,150. The third defendant was not disputing the plaintiff's claim of RM62,150 against the deposit as professional fee and charges in the event that they (the third defendant) were permitted to forfeit the deposit (see para 17).

[Bahasa Malaysia summary

Ini adalah permohonan interplider oleh plaintif menurut A 17 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 bagi jumlah sebanyak RM500,000 yang dipegang oleh firma guaman plaintif sebagai pemegang amanah. Fakta adalah bahawa defendan ketiga berhasrat untuk melaksanakan penstrukturan semula korporat untuk menstrukturkan semula hutang-hutangnya. Defendan ketiga melantik defendan-defendan pertama dan kedua untuk menjalankan skim penstrukturan semula. Pihak-pihak memasuki satu perjanjian yang dinamakan 'definitive agreement' ('perjanjian muktamad'). Di antara terma-terma perjanjian tersebut adalah bahawa defendan-defendan pertama dan kedua dikehendaki untuk mendepositkan sejumlah RM500,000 dengan firma guaman plaintif sebagai pemegang amanah untuk memastikan kepatuhan terhadap terma-terma perjanjian tersebut. Skim penstrukturan semula yang dicadangkan tersebut, walau bagaimanapun, adalah tertakluk kepada kelulusan Suruhanjaya Sekuriti. Dengan itu satu permohonan dibuat kepada Suruhanjaya tersebut untuk kelulusan. Suruhanjaya tersebut walau bagaimanapun, menolak permohonan tersebut atas alasan bahawa defendan pertama pernah sebelum ini dituduh di bawah s 11(c) Akta Pencegahan Rasuah

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1997 ('APR'). Defendan pertama dan kedua memohon ke mahkamah ini untuk deposit dipulangkan kepada mereka. Defendan ketiga, sebaliknya, memohon ke mahkamah ini supaya deposit dirampas. Plaintif, di pihak mereka memohon ke mahkamah ini untuk pertimbangan sama ada deposit sewajarnya dipulangkan kepada defendan pertama dan kedua atau sama ada defendan ketiga berhak untuk merampas deposit tersebut. Tambahan, plaintif juga memohon untuk perintah bahawa mereka berhak untuk fi profesional dan caj sebanyak RM62,150 dan bahawa jumlah tersebut ditolak daripada deposit.

Diputuskan, membenarkan permohonan plaintif dan defendan ketiga dengan kos; menolak permohonan defendan pertama dan kedua:

(1) Berikutan klausa 8.1(c) perjanjian muktamad, defendan ketiga mempunyai hak untuk merampas deposit tersebut. Terdapat kegagalan pada pihak defendan pertama dan kedua (pemegang saham yang disasarkan) dalam pelaksanaan skim penstrukturan semula yang dicadangkan. Kegagalan berlaku apabila Suruhanjaya Sekuriti menolak skim yang dicadangkan atas alasan pentadbiran korporat yang tidak memuaskan kerana defendan pertama pernah dituduh di bawah s 11(c) APR (lihat perenggan 10–11).

(2) Defendan pertama dan kedua tidak berhak untuk pemulangan deposit. Mereka telah melakukan kemungkiran perjanjian muktamad, yang membawa kepada penolakan penstrukturan semula yang dicadangkan, dan kemudian, membawa kepada pembatalan bersama perjanjian muktamad oleh pihak-pihak yang berkaitan. Kemungkiran tersebut dilakukan atas alasan fakta bahawa mereka telah gagal mendedahkan fakta material kepada Suruhanjaya Sekuriti semasa mengemukakan skim penstrukturan semula yang dicadangkan kepada Suruhanjaya tersebut. Melalui klausa 5.1(a) dan (b) perjanjian tersebut, defendan pertama dan kedua bertanggungjawab untuk mendedahkan kepada Suruhanjaya Sekuriti fakta bahawa defendan pertama telah dituduh di bawah s 11(c) APR. Mereka gagal berbuat demikian. Klausa 2.6(b) perjanjian muktamad menyirat bahawa defendan pertama dan kedua tidak berhak kepada pengembalian deposit jika pembatalan adalah disebabkan oleh kesalahan di pihak defendan pertama dan kedua — yang merupakan kes di sini (lihat perenggan 14).

(3) Melalui klausa 8.1 perjanjian muktamad, plaintif berhak kepada fi profesional mereka sebanyak RM62,150. Defendan ketiga tidak mempertikaikan tuntutan plaintif sebanyak RM62,150 terhadap deposit fi profesional dan caj jika mereka (defendan ketiga) dibenarkan merampas deposit tersebut (lihat perenggan 17).]

Notes:

For cases on interpleaders summons generally, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4052–4072.

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Legislation referred to

Anti-Corruption Act 1997 s 11 (c)
Rules of the High Court 1980 O 17 r 5, O 17 r 5(2)(c)

S C Chan (Aw Ee Leng with him) (Teh & Lee) for the plaintiff.
Rejinder Singh (Brian Jit with him) (D' Cruz & Brian) for the first and second defendants.
Oommen Koshy (Skrine) for the third defendant.

Mohd Hishamudin J:

[1] This originating summons is an interpleader application by the plaintiff pursuant to O 17 r 5 of the Rules of the High Court 1980 in relation to a sum of RM500,000 held by the plaintiff firm as a stakeholder.

[2] After examining the affidavits and hearing submissions of all parties, and with O 17 r 5(2)(c) in mind, I was satisfied that the question at issue between the claimants is purely a question of law and the facts are not in dispute; and I was also satisfied that I could summarily determine the question at issue. Accordingly, I made the following order:

(a) that the deposit to be forfeited by the third defendant, subject to the payment of professional charges to the plaintiff of a sum of RM62,150; and

(b) that the plaintiff and the third defendant be awarded costs, to be paid by the first and second defendants.

[3] My reasons are as follows.

[4] But first, I shall allude, but briefly, to the facts of the case. The third defendant was desirous of conducting a corporate restructuring exercise so as to restructure its debts. The third defendant appointed the first and second defendants to undertake the restructuring of the scheme. The parties entered into an agreement called the 'Definitive Agreement'. Under the terms of this agreement, the first and second defendants were required to deposit a sum of RM500,000 with the plaintiff's legal firm as a stakeholder for their due compliance of the terms in the agreement. The proposed restructuring scheme was, however, subject to the approval of the Securities Commission. Hence an application was made to the Comission for approval. The Commission rejected the application on the ground that the first defendant had previously been charged under s 11(c) of the Anti-Corruption Act 1997.

[5] The first and second respondents apply to this court for the deposit to be refunded to them.

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[6] The third respondent, on the other hand, applies to this court for the deposit to be forfeited. A

[7] The plaintiff on their part applies to this court for a determination as to whether the deposit shoud be refunded to the first and second defendants; or, whether the third defendant is entitled to forfeit the deposit. In addition, the plaintiff is also seeking for an order that they be entitled to their professional fee and charges of RM62,150, and such amount to be deducted from the deposit. B

[8] The parties are in agreement that the definitive agreement has been legally terminated. The first and second defendants' solicitors (Messrs Azman, Yong & Partners) in their letter of 2 May 2006 to the plaintiff duly acknowledged this fact. In the letter the solicitors wrote: C

> We were further informed by our clients that the said proposed restructuring scheme was unable to proceed and as a result the said Definitive Agreement dated 5th August 2004 was legally terminated. Our clients have on numerous occasions seek the refund of the said deposit with interest from you pursuant to Clause 2.6 of the Definitive Agreement dated 5th August 2004 but there was no official reply from your esteem firm. D E

[9] The third defendant in their letter of response to the plaintiff dated 11 May 2006, objected to the first and second defendants' request for a refund of the deposit and alleged that they (the third defendant) had suffered loss and damages arising from breaches of the definitive agreement by the first and second defendants. However, the third defendant by their letter appears to have accepted the fact that the definitive agreement had been legally terminated. F

[10] In my judgment the third defendant has the right to forfeit the deposit by virtue of cl 8.1(c) of the definitive agreement. This particular provisions states: G

> (c) in the event that the Target Shareholders default in the implementation of the Proposed Restructuring Scheme, then the Target Shareholders shall have no claim against Promto for the Costs and Expenses incurred so far, and that the Deposit as set out in Clause 2.6 thereof shall be forfeited by Promto. H

[11] I accept the submission of the third respondent that there has been a default on the part of the first and second defendants ('the target shareholders') in the implementation of the propose restructuring scheme. This default came about when the Securities Commission rejected the proposed scheme on the ground of unsatisfactory corporate governance as the first defendant had been charged under s 11(c). I

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[12] The first and second defendants submit that there cannot be a forfeiture of the deposit as there has been no default in the implementation of the scheme. They argue that there has been no default as to implementation af the scheme as the scheme had not been approved by the Securities Commission. They contend that by reason of the rejection of the scheme by the Securities Commission, there has been a non-fulfillment of a condition precedent and that triggers the application of cl 3.5 of the definitive agreement rather than cl 8.1(c). Clause 3.5 stipulates:

> 3.5 Non-Fulfillment:
>
> In the event that the Conditions Precedent are not fulfilled within the Conditional Period, the rights and obligations of the Parties hereinunder shall lapse, be of no further effect and deemed mutually terminated save for the rights and obligations of the Parties under Clause 8.

[13] With respect, I am unable to accept the first and second defendants' argument. The first and second defendants are proposing a narrow interpretation of the words *default in implementation* as found in cl 8.1(c). I am unable to agree to such an interpretation.

[14] There is, however, yet another reason as to why the first and second defendants are not entitled to a refund of the deposit. This other reason is that they have committed a breach of the definitive agreement, leading to a rejection of the restructuring proposal, and, subsequently, leading to the mutual termination of the definitive agreement by the parties concerned. They have committed a breach of the definitive agreement by reason of the fact that they have failed to disclose a material fact to the Securities Commission at the time of submitting the proposed restructuring scheme to the Commission. By virtue of cl 5.1(a) and (b) of the agreement the first and second defendants were under a duty to disclose to the Securities Commission the fact that the first defendant had been charged under s 11(c) of the Anti-Corruption Act. This they have failed to do. Now, not only did the first and second defendants fail to disclose to the Securities Commission about the corruption charge; realising the fact about the corruption charge and the non-disclosure having been discovered by the Commission, the first defendant, on 25 October 2005, proceeded to affirm a false statutory declaration saying that he had never been so charged; and the first and second defendants appealed to the Securities Commission against the rejection. Subsequently, the appeal was rejected by the Commission; and the first defendant was charged by the Securities Commission for furnishing a false information when submitting the restructuring scheme proposal (the false information being that he had never been charged for any corruption offence). This false information offence was, however, subsequently compounded by the Commission; and the first defendant paid a compound fine of RM200,000.

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[15] Now, cl 2.6(b) of the definitive agreement provides that the deposit is to be refunded to the first and second defendants if the agreement is terminated due to no fault on the part of the first and second defendants. Clause 2.6(b) states:

> (b) In the event that this Agreement is terminated due to no fault of the Target Shareholders, then the Stakeholders shall within thirty (30) days from the day of termination thereof return the Deposit together with interest to the Target Shareholders upon the receipt of a written notice from the Target Shareholders;

[16] This clause implies that the first and second defendants are not entitled to a refund of the deposit if the termination is due to a fault on the part of the first and second defendants — which is the case here.

[17] Finally, the plaintiff is entitled to their profession fee of RM62,150 by virtue of cl 8.1 of the definitive agreement. The third defendant is not disputing the plaintiffs claim of RM62,150 against the deposit as professional fee and charges in the event that they (the third defendant) are permitted to forfeit the deposit.

[18] Applications of the plaintiff and the third defendant are, respectively, allowed; the application of the first and second defendants are dismissed; costs awarded to the plaintiff and the third defendant.

Plaintiff's and third defendant's application allowed with costs and first and second defendant's application dismissed.

Reported by Ashgar Ali Ali Mohamed